Nos. 823, 824

In the Supreme Court of the United States

OCTOBER TERM, 1960

CRUM DINKENS, ET AL., PETITIONERS

v.

THE ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

STATE OF ALABAMA, EX REL. MACDONALD GALLION AS ATTORNEY GENERAL OF ALABAMA, PETITIONER

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	4
Argument	6
Conclusion	13

CITATIONS

Cases:

Byrd v. *Brice*, 104 F. Supp. 442, affirmed, 201 F. 2d 664	7
Claflin v. *Houseman*, 93 U.S. 130	11
Coy, In re, 127 U.S. 731	7
Davis v. *Schnell*, 81 F. Supp. 872, affirmed, 336 U.S. 933	7
De Busk v. *Harvin*, 212 F. 2d 143	10
Eastern States Petroleum Corp. v. *Rogers*, 280 F. 2d 611	11
Galveston, Harrisburg & San Antonio Railway Co. v. *Wallace*, 223 U.S. 481	11
Hannah v. *Larche*, 363 U.S. 420	8
Lambert Run Coal Co. v. *Baltimore & Ohio R. Co.*, 258 U.S. 377	12
Lichter v. *United States*, 334 U.S. 742	11
Lockerty v. *Phillips*, 319 U.S. 182	11
Poresky, Ex parte, 290 U.S. 30	12
Siebold, Ex parte, 100 U.S. 371	6
Tarble's Case, 13 Wall. 397	10
United States v. *Alabama*, decided March 17, 1961 (M.D. Ala.)	7
United States v. *Association of Citizens Councils*, 187 F. Supp. 846	7
United States v. *Murdock*, 284 U.S. 141	9
United States v. *Raines*, decided September 13, 1960 (M.D. Ga.)	7
United States v. *White*, 322 U.S. 694	8
Wallace, In re, 170 F. Supp. 63	7

Cases—Continued
Washington Water Power Co. v. *City of Coeur d'Alene*, 24 F. Supp. 790 — Page 12
Western Ass'n of Lumbermen & Loggers v. *Krug*, 79 F. Supp. 344 — 12
Wilson v. *United States*, 221 U.S. 361 — 8
Constitution and statutes:
U.S. Constitution:
Article I, Sec. 4 — 6
Fourteenth Amendment — 7
Fifteenth Amendment — 7
Civil Rights Act of 1960, 74 Stat. 86:
Sec. 301 — 2, 8
Sec. 302 — 3
Sec. 303 — 3, 4, 10
Sec. 304 — 4
Sec. 305 — 4, 6, 10, 11
Sec. 306 — 4
28 U.S.C. 1442 — 5, 10
28 U.S.C. 2282 — 11
Miscellaneous:
Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345 (1930) — 10

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No. 823

CRUM DINKENS, ET AL., PETITIONERS

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WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The opinion of the district court is reported at 187 F. Supp. 848. The opinion of the court of appeals (D. Pet. 9–10; G. Pet. 10–11)[2] is reported at 285 F. 2d 430.

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[1] This is the caption of this case as it appears in the opinion and order of the court of appeals (D.R. 185, 187). Petitioners have used a somewhat different caption here (*Crum Dinkins, et al.* v. *William P. Rogers, As Attorney General of the United States, (Robert F. Kennedy, successor in office)*.

[2] "D. Pet." and "D.R." refer to the petition and record in No. 823 (the *Dinkens* case). "G. Pet." and "G.R." refer to the petition and record in No. 824 (the *Gallion* case).

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1961 (D.R. 187; G.R. 139). The petitions for writs of certiorari were filed on March 17, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

No. 823, the *Dinkens* case

1. Whether Title III of the Civil Rights Act of 1960 is constitutional.

2. Whether the Attorney General's demand for records complied with the Act.

No. 824, the *Gallion* case

1. Whether a state court has jurisdiction to enjoin the Attorney General of the United States from performing his duties under the Civil Rights Act of 1960.

2. Whether a single federal judge may decide such a question of jurisdiction in a case which has been removed from a state court.

STATUTE INVOLVED

Title III of the Civil Rights Act of 1960 (74 Stat. 86) provides:

> SEC. 301.—Every officer of election shall retain and preserve, for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico

are voted for, all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election, except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State or the Commonwealth of Puerto Rico designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.

SEC. 302.—Any person, whether or not an officer of election or custodian, who willfully steals, destroys, conceals, mutilates, or alters any record or paper required by section 301 to be retained and preserved shall be fined not more that $1,000 or imprisoned not more than one year, or both.

SEC. 303.—Any record or paper required by section 301 to be retained and preserved shall, upon demand in writing by the Attorney General or his representative directed to the person having custody, possession, or control of such record or paper, be made available for inspection, reproduction, and copying at the principal office of such custodian by the Attorney General or his representative. This demand shall contain a statement of the basis and the purpose therefor.

SEC. 304.—Unless otherwise ordered by a court of the United States, neither the Attorney General nor any employee of the Department of Justice, nor any other representative of the Attorney General, shall disclose any record or paper produced pursuant to this title, or any reproduction or copy, except to Congress and any committee thereof, governmental agencies, and in the presentation of any case or proceeding before any court or grand jury.

SEC. 305.—The United States district court for the district in which a demand is made pursuant to section 303, or in which a record or paper so demanded is located, shall have jurisdiction by appropriate process to compel the production of such record or paper.

SEC 306.—As used in this title, the term, "officer of election" means any person who, under color of any Federal, State, Commonwealth, or local law, statute, ordinance, regulation, authority, custom, or usage, performs or is authorized to perform any function, duty, or task in connection with any application, registration, payment of poll tax, or other act requisite to voting in any general, special, or primary election at which votes are cast for candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico.

STATEMENT

On May 9, 1960, the Attorney General of the United States, acting pursuant to Section 303 of the Civil Rights Act of 1960, *supra*, presented to the Board of Registrars of Wilcox County, Alabama, a written

demand requesting the Board to make available for inspection and copying its registration and voting records relating to election for federal office (G.R. 21). On May 23, 1960, a similar demand was made upon the Board of Registrars of Montgomery County, Alabama (D.R. 4–5; G.R. 19).

On June 6, 1960, the Attorney General of Alabama commenced the *Gallion* case (No. 824) by seeking and obtaining from the Circuit Court of Montgomery County, Alabama, a temporary injunction and restraining order forbidding the Attorney General of the United States, and his "agents, servants, employees and attorneys * * *" to inspect or copy the records and papers in the possession, custody and control of the "several Boards of Registrars of the various counties of Alabama, under the color of authority purportedly given * * * by the 'Civil Rights Act of 1960'" (G.R. 22–25). The state court's injunction was predicated upon allegations that the Civil Rights Act of 1960 is unconstitutional and void (G.R. 3–18). On June 11, 1960, respondents in the *Gallion* case, acting pursuant to 28 U.S.C. 1442, removed the state court action to the District Court for the Middle District of Alabama (G.R. 26–33) and subsequently moved to dismiss the complaint. On July 6, 1960, petitioner in the *Gallion* case filed a motion to remand the case to the Circuit Court for Montgomery County, Alabama (G.R. 40–41).

On June 13, 1960, following the refusal of the Board of Registrars of Montgomery County to comply with his demand for production, the Attorney General of the United States began the *Dinkens* case

(No. 823) by applying to the District Court for the Middle District of Alabama, under Section 305 of the Civil Rights Act of 1960, for an order requiring the production of the election records for inspection, reproduction, and copying (D.R. 2). Petitioners in the *Dinkens* case submitted a counterclaim demanding that the court strike and dismiss the Attorney General's application and enjoin the Attorney General from proceeding under Title III of the Act (D.R. 23, 25).

Because of their common issues on the merits, the two cases were consolidated and, on July 13, 1960, argument was heard on both. On August 11, 1960, the district court entered judgment. In the *Dinkens* case, it dismissed the cross-complaint and ordered compliance within fifteen days with the demand of the Attorney General for production of the records (D.R. 113, 124, 125). In the *Gallion* case, it denied petitioner's motion for a remand and granted respondent's motion to dismiss the suit (G.R. 108–119). The court of appeals affirmed *per curiam* (D.R. 187; G.R. 139).

ARGUMENT

The *Dinkens* case

1. Petitioners contend (D. Pet. 5–6) that Title III of the Civil Rights Act of 1960, *supra*, pp. 2–4, is unconstitutional for a multitude of reasons. All of these contentions are plainly without merit.

First, the Act, in requiring the production of records with regard to federal elections, is clearly within the power given Congress by Article I, Section 4, of the Constitution. See *Ex parte Siebold*, 100 U.S. 371;

In re Coy, 127 U.S. 731. Since it is designed to prevent discrimination in voting rights because of color, it is also clearly appropriate legislation to effectuate the Fourteenth and Fifteenth Amendments. As was said in *In re Wallace*, 170 F. Supp. 63, 67 (M.D. Ala.), with respect to the congressional grant of subpoena power to the Commission on Civil Rights, "The provision in the Act providing for investigation of alleged discriminatory practices, including inspection of voting and other pertinent records, must be considered an essential step in the process of enforcing and protecting the right to vote regardless of color, race, religion, or national origin." Data from voting records has been used many times as evidence to prove racial discrimination in the voting process. See, *e.g.*, *Davis* v. *Schnell*, 81 F. Supp. 872 (S.D. Ala.), affirmed, 336 U.S. 933; *Byrd* v. *Brice*, 104 F. Supp. 442 (W.D. La.), affirmed, 201 F. 2d 664 (C.A. 5); *United States* v. *Raines*, decided September 13, 1960 (M.D. Ga.); *United States* v. *Alabama*, decided March 17, 1961 (M.D. Ala.)

Second, Title III cannot possibly constitute *ex post facto* legislation, since it provides no criminal penalties for past conduct. Punishment may not be imposed only for disobedience of a court order to produce election records or for destruction of election records after passage of the Act. See *United States* v. *Association of Citizens Councils*, 187 F. Supp. 846, 847–848 (W.D. La.).

Third, petitioners were not deprived of any constitutional right of cross-examination and confrontation in this proceeding. This Court rejected a similar

argument in *Hannah* v. *Larche*, 363 U.S. 420,[3] even though in that case the Commission on Civil Rights was attempting to compel the testimony of witnesses, whereas here the Attorney General sought only the production of records belonging, not to the registrars, but to the state. Cf. *Wilson* v. *United States*, 221 U.S. 361, 380; *United States* v. *White*, 322 U.S. 694. To our knowledge, it has never been held or even been seriously suggested that, before a demand for governmental records can be enforced, the custodian is entitled to a trial at which he may cross-examine the persons whose information possibly contributed to the decision to make the demand.[4]

Fourth, Title III is not unconstitutionally vague and indefinite because, as petitioners allege, it is not clear when the twenty-two month period for retaining election records, provided for in Section 301, begins. That section clearly states that papers covered by the Act have to be retained from the time they are received until twenty-two months after the date of any

[3] The suggestion was made below that, since the Attorney General, unlike the Commission on Civil Rights, also exercises an "accusatory function," *Hannah* v. *Larche* does not apply. But, as the district court held, this Court in the *Hannah* case was "distinguishing *not* between agencies having prosecutive functions and those not having such functions, but rather between *investigations* and *adjudications*, regardless of the agency involved" (emphasis in original). 187 F. Supp. at 854.

[4] This disposes also of the point (D. Pet. 6) that the district court erred in refusing to require respondents to answer certain interrogatories. Those interrogatories (D.R. 20) sought to elicit the names of any person who might have complained to the Department of Justice concerning respondents' conduct of the Montgomery County registrar's office.

federal election to which they apply (see *supra*, pp. 2-3). Alabama law, which permits the destruction of unsuccessful applications thirty days after their denial, must, of course, yield to the requirements of federal law. *United States* v. *Murdock*, 284 U.S. 141.

2. Petitioners further contend (D. Pet. 6) that the Attorney General's demand and the district court's order of enforcement are too broad because they refer to "all records and papers" in the custody of the respondents relating to federal elections (D.R. 4, 125), "which could mean records kept from time immemorial" (D. Pet. 6). Both the demand and the order, however, were confined to "records and papers * * * relating to any application * * * or other act requisite to voting in any * * * election in which (federal) candidates * * * *are* voted for" (emphasis added) (D.R. 4, 126). Thus, they cover only those records pertaining to persons who either are or might be eligible to vote in *current* federal elections. Since Alabama has a system of permanent registration, the registration data of the earliest living registered voter is as current as that of the newly-registered voter. In like manner, the rejected applications of living persons who might otherwise be voters are current. Thus, neither the demand nor the order reaches back any further than those records which are pertinent to the protection of present voting rights.

The *Gallion* case

1. Petitioner contends (G. Pet. 4-5) that the state court had jurisdiction to enjoin the Attorney General from proceeding under the Civil Rights Act of 1960,

and that therefore the district court erred in granting respondent's motion to dismiss.[6]

First, it is well settled that state courts are without power to interfere with the conduct of federal officials acting under federal law. See, *e.g., Tarble's Case,* 13 Wall. 397; Warren, *Federal and State Court Interference,* 43 Harv. L. Rev. 345 (1930). Section 303 of the Civil Rights Act of 1960, *supra,* p. 3, expressly authorizes the Attorney General to demand that state election officials make available election records to him or his representative for inspection, reproduction, and copying. Section 305 of that Act provides that, after such a demand has been made, the federal district courts have jurisdiction to enforce these demands. The injunction which petitioner sought from the state court would have prevented the Attorney General from proceeding under Sections 303 and 305 by forbidding him from inspecting, reproducing, or copying the election records. Clearly, this would be a serious and direct interference with the Attorney General's performance of his duty under the Act.

Second, state courts have no concurrent jurisdiction in cases arising under federal law when such jurisdiction is prohibited by express provision or "by incompatibility in its exercise arising from the

[6] Petitioner also claims (G. Pet. 5) that the district court should have remanded the case to the state court. But 28 U.S.C. 1442 expressly provides that a civil action brought against a federal official in a state court is removable to the federal courts. See *De Busk* v. *Harvin,* 212 F. 2d 143 (C.A. 5).

nature of the particular case." *Claflin* v. *Houseman*, 93 U.S. 130, 136. Such incompatibility is particularly patent here. The Civil Rights Act of 1960 was designed to protect the constitutional rights of citizens from denial or abridgement by state action. It would be incongruous if the power of enforcement—and of interference—were possessed by a state court, that is, by the very entity with whose conduct the legislation is concerned. Moreover, the enforcement procedure in Section 305 is a full and complete remedy with respect to any legitimate claims the recipient of a demand for production may have. Where Congress has provided a special judicial procedure, relief ordinarily may be had only through that procedure. Cf. *Galveston, Harrisburg & San Antonio Railway Co.* v. *Wallace*, 223 U.S. 481, 490; *Lichter* v. *United States*, 334 U.S. 742, 789–793; *Lockerty* v. *Phillips*, 319 U.S. 182, 188; *Eastern States Petroleum Corp.* v. *Rogers*, 280 F. 2d 611 (C.A. D.C.).

2. Petitioner also contends (G. Pet. 5, 7) that 28 U.S.C. 2282 required the convening of a three-judge court.[6] But 28 U.S.C. 2282 requires only that a three-judge court be convened to consider whether to grant an injunction against the enforcement of a federal act. The statute does not require that preliminary questions such as the standing of the plain-

[6] Petitioner raised this point in *Gallion* only in oral argument before the district court.

tiffs (*Washington Water Power Co.* v. *City of Coeur d'Alene*, 24 F. Supp. 790, 793 (D. Idaho)), the lack of a justiciable controversy (*Western Ass'n of Lumbermen & Loggers* v. *Krug*, 79 F. Supp. 344, 346–347 (D. Ore.)), or jurisdiction, must be decided by a three-judge court. The district judge dismissed petitioner's action on the ground that the state court was without jurisdiction to hear and dispose of the complaint. For the jurisdiction of a federal court depends on the jurisdiction of the state court from which the case was removed. *Lambert Run Coal Co.* v. *Baltimore & Ohio R. Co.*, 258 U.S. 377.

Even if the state court's lack of power to issue a complaint were considered as going to the constitutional merits of the action rather than to its jurisdiction, the district judge nevertheless correctly dismissed the action. As we have shown (pp. 9–11), the state court clearly was without power to enjoin the Attorney General from performing his duty under federal law. Since no substantial constitutional problem was involved, the district judge was not required to convene a three-judge court. See, *e.g.*, *Ex parte Poresky*, 290 U.S. 30, 32.[7]

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[7] Petitioner in *Gallion* also raises (G. Pet. 5–7) the same substantive contentions as are involved in the *Dinkens* case. Since, however, the district court had no jurisdiction over the *Gallion* case, these substantive issues were not reached. In any event, these contentions are without merit (see *supra*, pp. 6–9).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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